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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 44459
Plaintiff-Respondent,)	
)	Ada County Case No.
v.)	CR-2013-13905
)	
DAVID KENNETH SANKEY,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Sankey failed to establish that the district court abused its discretion by denying his Rule 35 motion for reduction of his unified sentence of five years, with one and one-half years fixed, imposed upon his guilty plea to aggravated assault?

Sankey Has Failed To Establish That The District Court Abused Its Sentencing Discretion

In June 2014, Sankey pled guilty to aggravated assault and the district court imposed a unified sentence of five years, with one and one-half years fixed, and retained jurisdiction. (R., pp.143-47.) After a period of retained jurisdiction, the district

court suspended Sankey's sentence and placed him on probation for five years. (R., pp.153-60.) Less than two months later, Sankey's probation officer filed a report of probation violation alleging that Sankey had violated probation by failing to attend aftercare group and absconding supervision. (R., pp.166-67.) Over a year later, the state filed an amended motion for probation violation adding new the new allegations that Sankey violated his probation by failing to notify his probation officer of a change of address, failing to submit to a urinalysis, failing to pay fines, and failing to pay restitution. (R., pp.179-81.) At the admit/deny hearing on May 4, 2016, Sankey admitted to failing to attend aftercare group and absconding, and the remaining allegations were dismissed. (5/4/16 Tr., p.1, L.12 – p.3, L.17.) The court revoked Sankey's probation and executed the underlying sentence. (R., pp.212-15.) Sankey filed a Rule 35 motion for a reduction of sentence, timely only from the order revoking probation, which the district court denied. (R., pp.216-17, 218-22.) Sankey filed a notice of appeal, timely only from the district court's order denying his Rule 35 motion. (R., pp.223-25.)

"Mindful that he did not provide any new or additional information" in support of his Rule 35 motion, as required by State v. Huffman, 144 Idaho 201, 159 P.3d 838 (2007), Sankey nevertheless asserts that the district court abused its discretion by denying his Rule 35 motion for a reduction of sentence because he suffers from substance abuse issues and desires treatment, has support from the community, and has taken responsibility. (Appellant's brief, pp.3-4.) Sankey has failed to establish an abuse of discretion.

In Huffman, the Idaho Supreme Court observed that a Rule 35 motion “does not function as an appeal of a sentence.” 144 Idaho at 203, 159 P.3d at 840. The Court noted that where a sentence is within statutory limits, a Rule 35 motion is merely a request for leniency, which is reviewed for an abuse of discretion. Id. Thus, “[w]hen presenting a Rule 35 motion, the defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the Rule 35 motion.” Id. Absent the presentation of new evidence, “[a]n appeal from the denial of a Rule 35 motion cannot be used as a vehicle to review the underlying sentence.” Id. Accord State v. Adair, 145 Idaho 514, 516, 181 P.3d 440, 442 (2008).

Sankey did not appeal the judgment of conviction in this case. On appeal, he acknowledges he failed to “provide any new or addition information” in support of his Rule 35 motion, as required by Huffman, but nevertheless argues that his sentence was excessive as originally imposed and, therefore, the district court should have reduced his sentence pursuant to his Rule 35 motion because of mitigating factors. (Appellant’s brief, pp.3-4.) Because Sankey presented no new evidence in support of his Rule 35 motion, he failed to demonstrate in the motion that his sentence was excessive. Having failed to make such a showing, he has failed to establish any basis for reversal of the district court’s order denying his Rule 35 motion for a reduction of sentence.

Conclusion

The state respectfully requests this Court to affirm the district court's order denying Sankey's Rule 35 motion for a reduction of sentence.

DATED this 10th day of January, 2017.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

ALICIA HYMAS
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 10th day of January, 2017, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

ELIZABETH ANN ALLRED
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General